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No. 1077

In the Supreme Court of the United States

OCTOBER TERM, 1946

PACIFIC ELECTRIC RAILWAY COMPANY, A CORPORATION, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

INDEX

CITATIONS

736663—47——1

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OPINIONS BELOW

The opinion of the district court (R. 173–196) is reported at 64 F. Supp. 796.[1] The opinion of the circuit court of appeals (R. 206–216) is reported at 157 F. 2d 902.

JURISDICTION

The judgment of the circuit court of appeals was entered on November 4, 1946. (R. 216–217.)

[1] The District Court's findings of fact and conclusions of law (R. 155–165) are not included in the opinion.

Petition for rehearing was denied December 5, 1946. (R. 217.) The petition for a writ of certiorari was filed February 28, 1947. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether petitioner properly paid carriers tax during the taxable years under the Carriers Taxing Act of 1937 and Subchapter B, Chapter 9 of the Internal Revenue Code on one-half the compensation of employees engaged in the bus line operations designated as "Coach Lines." The answer depends upon whether those employees were the joint employees of petitioner and Los Angeles Railway, which jointly conducted the operations, or of Coach Lines as a separate employing entity.

STATUTES AND REGULATIONS INVOLVED

The pertinent statutes and Regulations are set forth in the Appendix, *infra,* pp. 19–32.

STATEMENT

Petitioner, the Pacific Electric Railway Company, is a California corporation with its principal place of business in Los Angeles. (R. 53.) It now is, and at all times since January 1, 1937, has been, (1) a common carrier engaged in the transportation of passengers and property for hire by rail and motor coach in Los Angeles

and adjacent territory; (2) a railroad corporation engaged in interstate commerce; and (3) an "employer" as defined in the Railroad Retirement Act of 1937, the Carriers Taxing Act of 1937, and Chapter 9, Subchapter B, of the Internal Revenue Code, formerly the Carriers Taxing Act of 1937, and subject to the provisions of these statutes. (R. 54, 55). The Los Angeles Railway Corporation, a California corporation hereinafter called "Los Angeles Railway," is a street railway corporation and as such has not been and is not now an employer subject to the Railroad Retirement Act, Carriers Taxing Act of 1937, or Chapter 9, Subchapter B, of the Internal Revenue Code; instead, it is subject to the provisions of Chapter 9, Subchapter A, of the Internal Revenue Code, which originated as a part of the Social Security Act and is now known as the "Federal Insurance Contributions Act." (R. 55.)

At all times since January 1, 1937, petitioner and Los Angeles Railway have jointly operated certain motor coach routes in Los Angeles and adjacent territory for the transportation of passengers by motor coach, such routes being operated for convenience. (R. 54.) The operations are presently being carried on under the name "Los Angeles Motor Coach Lines" and were previously carried on under the names "Los Angeles Motor Coach Company" and "Los Angeles Motor Bus Company," respectively. (R. 53–54.) None of

these is or ever has been a corporation; the names adopted have at all times been used simply for the purpose of identifying the joint motor coach operations of petitioner and Los Angeles Railway conducted pursuant to certificates of public convenience and necessity issued by the Railroad Commission of the State of California authorizing operation under an agreement dated August 15, 1923, between petitioner and Los Angeles Railway. (R. 54–55.) The name "Coach Lines" will be used herein to designate these operations.

During the period January 1, 1937, to December 31, 1940, inclusive, petitioner paid employees and employers tax under the Carriers Taxing Act of 1937 and subchapter B, Chapter 9, of the Internal Revenue Code, on one-half of the total compensation paid to the employees engaged in the Coach Lines service. That portion of their compensation was charged to and borne by petitioner. Los Angeles Railway paid social security tax on the remaining one-half. (R. 63.) The total carriers tax paid by taxpayer during the period January 1, 1937, to December 31, 1940, inclusive, on one-half of the compensation of the employees engaged in the Coach Lines service was $66,124.65, of which $33,062.45, or approximately one-half, was employers tax and the other one-half, $33,062.20 employees tax. (R. 56–62.)

On or about April 22, 1941 (R. 24, 32, 37, 42), petitioner filed claims for refund of the carriers taxes paid in respect of the employees engaged

in the Coach Lines service during the period January 1, 1937, to December 31, 1940, inclusive. (R. 22–26, 30–44.) In these claims for refund, petitioner admitted that the taxes had been paid in accordance with the opinion of its counsel and that the Coach Lines was not a corporation and was merely a name given to the motor bus service jointly operated by petitioner and Los Angeles Railway. (R. 25, 33, 38, 43.) The claims were filed as a protective measure, because of a ruling of the California Employment Commission that Coach Lines is an employing unit within the meaning of the California Unemployment Insurance Act (R. 25–26, 33–34, 38–39, 43–44). The Commissioner of Internal Revenue disallowed the claims for refund on the ground that the individuals engaged in the Coach Lines operations were joint employees of petitioner and Los Angeles Railway (rather than employees of the Coach Lines as a separate entity) and, thus, that carriers tax is payable by petitioner on one-half of the compensation of such employees and social security payable by Los Angeles Railway on the other one-half. (R. 27–29.) Petitioner subsequently filed suit in the United States District Court for the Southern District of California for a refund of the carriers taxes it paid on one-half of the wages of the employees engaged in the Coach Lines service. (R. 2–17.)

The district court held, on the basis of facts which were all stipulated and which will be summa-

rized later, that Coach Lines is an "association" under the decision in *Morrissey* v. *Commissioner*, 296 U. S. 344, and therefore a "company" within the meaning of Section 1532 of the Internal Revenue Code, which is contained in subchapter B of Chapter 9 and corresponds to Section 1 of the Carriers Taxing Act of 1937, and that, since the "company" was not a carrier, its employees were covered by the social security statutes and not one-half by the carriers taxing statute. (R. 176–196.) On appeal, the court below reversed the decision of the district court, holding that the stipulated facts showed that Coach Lines was not an "association" or any other type of employing entity, that the employees engaged in the Coach Lines operations were joint employees of petitioner and Los Angeles Railway, and that, therefore, to the extent of one-half of their compensation, these employees were employees of petitioner within the meaning of the carriers taxing statute, now subchapter B, Chapter 9 of the Internal Revenue Code, and that the taxes involved had been properly collected. (R. 214–216.)

The facts bearing on the issue as to the employer of the employees engaged in the Coach Lines operations were all stipulated (R. 53–73) and, in addition to those already stated, are as follows:

The joint operations of the Coach Lines by petitioner and Los Angeles Railway have at all times been conducted in accordance with an agree-

ment dated August 15, 1923, which is set out in full at pages 17–21 of the Record. (R. 55.) This agreement specifically provided that the operations should constitute only an agency or joint department and that it should not constitute a partnership. (R. 17–18.)

The operations, which are in intrastate commerce only, are conducted by petitioner's president and the president of Los Angeles Railway, as the joint agents (called directors) of their companies, through a manager, an assistant manager, a superintendent of equipment and other subordinate officers and employees. (R. 17, 18–19, 64.) The agreement provided (R. 19) that these directors "shall jointly manage in all respects for their principals herein [petitioner and Los Angeles Railway Corporation], the said department, and have general control thereover." Petitioner and Los Angeles Railway, through their joint agents, jointly regulate the conditions of employment of employees and dismiss employees in the Coach Lines service. (R. 56.) The Coach Lines, as such, has no officers and the joint employees charged with the supervision and management of the Coach Lines operations are directly responsible to the general manager who in turn reports directly to the managing directors by whom he is appointed, the presidents of the two companies. The general manager, together with his supervisory staff, has general charge of the

736663—47——2

Coach Lines operations, but all matters of a controversial nature, or which in any way might conflict with the exclusive interests of petitioner or Los Angeles Railway, and all matters involving important questions of policy are determined by agreement between petitioner's president and the president of Los Angeles Railway. (R. 64–65.)

The accounting and auditing work in connection with the Coach Lines operations is performed by the accounting department of Los Angeles Railway. The law, claim, purchasing, and traffic work is performed by petitioner through its officers and departments regularly performing such work exclusively for petitioner. Employees engaged in the Coach Lines service are accorded medical treatment and hospitalization by the hospital department maintained by petitioner under the same terms, rules and regulations as govern the rendition of medical and hospital service to the sole employees of petitioner. (R. 65.) Tariffs naming local one-way, round-trip and commutation fares between points on lines operated under the Coach Lines name and joint fares between points on the lines of petitioner and Los Angeles Railway are issued by H. O. Marler, traffic manager of petitioner, and duly posted, published and on file with the Railroad Commission of the State of California. (R. 66.)

The joint employees engaged in the Coach Lines service, including the supervisory forces, are

employed to work exclusively in this service and devote their entire time to it and are not interchanged with either petitioner or Los Angeles Railway. (R. 65.)

Each company owns and furnishes approximately one-half of the equipment and facilities devoted to this joint service. Title to these facilities remains in the company furnishing them. (R. 18, 64.) All revenues from the joint operation are deposited in a separate account identified with the operation, and payment of all expenses in connection with the operation, including payrolls, are made from this special account. (R. 65.) The expense incurred in connection with the conduct of the joint operation is borne approximately in equal proportions by each company, and each shares in the revenues and losses in the same ratio. (R. 20, 64.) The agreement provided that neither of the parties should, without the consent of the other, sell or assign its interest in the subject matter. (R. 21.) And it was further provided that the agreement should continue until terminated at any time by either party giving six months' written notice to the other party of its intention to terminate the agreement. (R. 21.)

Petitioner maintains its records in accordance with the Uniform System for Classification of Accounts as prescribed by the Interstate Commerce Commission and includes in its report to

the Interstate Commerce Commission its proportionate share of gross revenues and expenses, credited and charged to it in connection with the operation designated Coach Lines. The Coach Lines items of revenue and expenses are included together with all other items of revenues and expenses under the appropriate item therefor in this classification. (R. 55–56.)

ARGUMENT

As petitioner concedes (Pet. 8), the sole issue involved in this case is whether the persons engaged in the operations of Coach Lines are employees of Coach Lines as an employing entity or are the joint employees of petitioner and Los Angeles Railway.[2] As we shall show, the stipulated

[2] Had petitioner owned or controlled Coach Lines, instead of having a 50% control, the employees of Coach Lines would apparently have been covered exclusively by the Carriers Taxing Act even if Coach Lines were an employing entity. An "employer" for the purposes of the Act (see Sec. 1532, Internal Revenue Code (Appendix, *infra*, p. 24)) includes a company which is (1) owned or controlled by one or more carriers and (2) performs any service in connection with the transportation of passengers by railroad. The Coach Lines apparently fulfill the second requirement, for it is stipulated that (R. 66):

> * * * there is in effect a system for transferring of passengers from and to motor coaches operated in Los Angeles Motor Coach Lines service to and from rail cars and motor coaches operated on certain lines of both Pacific Electric Railway Company and Los Angeles Railway Corporation. That tariffs naming local one-way, round-trip and commutation fares be-

facts clearly require the conclusion that, as the court below held (R. 216), these employees are joint employees of petitioner and Los Angeles Railway. Indeed, petitioner paid the tax here involved on the basis of such a conclusion and instituted this proceeding only as a protective measure, because of a ruling of the California Employment Commissioner that Coach Lines is an employing entity. (See R. 25–26, 33–34, 38–39, 43–44.) That ruling was affirmed by a California inferior court on February 1, 1946, in *Los Angeles Ry. Corp.* v. *Department of Employ., Etc.*, 166 P. 2d 602. However, the decision in that case relied on the decision of the district court in the present case and, since the rehearing granted in the state case on March 1, 1946 (*ibid.*) is still pending (Pet. 12), the state court is no doubt awaiting the outcome of the present proceeding. The decision below, accompanied by a denial of certiorari, should therefore be sufficient to dissipate the present conflict with this state decision, as well as any conflict in administrative rulings as to

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tween points on lines operated under the name Los Angeles Motor Coach Lines and joint fares between points on said lines and points on lines of Los Angeles Railway Corporation and Pacific Electric Railway Company are issued by H. O. Marler, Traffic Manager of Pacific Electric Railway Company, and duly posted, published and on file with the Railroad Commissioner of the State of California.

Thus, see *Railroad Retirement Board* v. *Duquesne Co.*, 326 U. S. 446. But on this point compare cases cited *infra*, p. 17.

the status of these employees.[3] Since the issue involved turns on the peculiar facts of this case, no federal question is presented requiring further review by this Court.

As the court below held (R. 214), Coach Lines is not an "association." An association is an organization of persons without a charter but having the general form and mode of procedure of a corporation. Its essential characteristics are (1) an entity which holds title to the property involved in the business; (2) a centralized management analogous to that of corporate activities; (3) a continuity of the business enterprise which is unaffected by acts of the owners of the beneficial interests or by transfer of those interests; and (4) a limitation of the personal liability of the participants in the business undertaking. *Morrissey* v. *Commissioner,* 296 U. S. 344; *Helver-*

[3] A ruling of the Social Security Board is in conflict with the decision below and administrative rulings of other agencies, for, on a claim for benefits under the social security statutes by the widow of one of the former bus operators on Coach Lines, the Social Security Board ruled that Coach Lines is an employer within the meaning of the social security statutes. (R. 113–121.) On the other hand, the Railroad Retirement Board ruled in 1940 that the employees engaged in the Coach Lines operations are joint employees of petitioner and Los Angeles Railway, that they are therefore employees of petitioner to the extent of the one-half of their compensation paid by petitioner, and that that one-half of their compensation is subject to carriers tax. (R. 139–146.) A ruling of the Interstate Commerce Commission is in accord with this ruling of the Railroad Retirement Board. (R. 147–154.)

ing v. *Combs,* 296 U. S. 365; *Helvering* v. *Coleman-Gilbert,* 296 U. S. 369; *Commissioner* v. *Rector & Davidson,* 111 F. 2d 332, 333 (C. C. A. 5), certiorari denied, 311 U. S. 672. None of these characteristics attended the operation of the Coach Lines. No separate entity held title to the property used in the operations; petitioner and Los Angeles Railway each furnished all of the equipment and facilities used and each held title to the equipment and facilities it furnished. There was no separate centralized management of the Coach Lines akin to the management of a corporation; the bus lines were managed by a general manager and subordinates who were directly accountable to the presidents of petitioner and Los Angeles Railway as the directors of the operations and agents of their principals, petitioner and Los Angeles Railway. Thus, petitioner and Los Angeles Railway controlled the Coach Lines operations, instead of a separate governing body elected by stockholders or beneficial owners.

Coach Lines had no continuity of interest unaffected by the acts of its beneficial owners. In the first place, Coach Lines had no beneficial owners; as already stated, petitioner and Los Angeles Railway separately owned all of the equipment and facilities. Thus, unlike a corporation, there were no common assets to be represented by shares of stock or certificates of beneficial ownership. Secondly, the joint enterprise could be terminated by either petitioner or Los

Angeles Railway upon six months' notice. Third, no provision was made for continuance of the operations if either petitioner or Los Angeles Railway, each of which separately owned its part of the property used in the operations, should be dissolved or should cease to exist. And, of course, since there was no common property and hence no beneficial interests in such property, there was no limitation on the liability of the beneficial owners.

The joint operation of Coach Lines did not establish any other organization recognizable as an entity. It is stipulated that Coach Lines is not and has never been a corporation. It obviously is not a joint-stock company. In the agreement for the operation of this bus service, petitioner and Los Angeles Railway stated that Coach Lines was not to be a partnership (R. 18.) It clearly was not one. A partnership requires joint or co-ownership of the property and business (*City of Wheeling* v. *Chester,* 134 F. 2d 759, 762 (C. C. A. 3); *McClennen* v. *Commissioner,* 131 F. 2d 165, 167 (C. C. A. 1); *Stilgenbaur* v. *United States,* 115 F. 2d 283, 285 (C. C. A. 9)), and petitioner and Los Angeles Railway separately owned the property used in the business. Moreover, in a partnership each partner has power to act as agent for his co-partner (*Karrick* v. *Hannaman,* 168 U. S. 328, 334) while in the present case petitioner and Los Angeles Railway acted through

joint agents who were, however, limited to matters respecting the operation of the bus lines. In brief, Coach Lines was simply an agency or joint department of petitioner and Los Angeles Railway, as is shown by the stipulation of facts. Although a joint venture may possibly under some circumstances constitute an employing entity, this agency or joint department had no authority interposed between the employees and either petitioner or Los Angeles Railway.

In order to show that the persons engaged in the Coach Lines operations are "employees" it is necessary to reveal the identity of their employer or employers. These persons are "employees" within the meaning of the statutes applicable to carriers (see Section 1532 of the International Revenue Code) because they are subject to the continuing authority of an employer to supervise and direct the manner of rendition of the services which they render for compensation. Under Article 3, Treasury Regulations 100, promulgated under the Carriers Taxing Act of 1937 (Appendix, *infra*, pp. 29–30), the status of a person as an employee depends upon whether the person is in the service of one or more employers and the features mentioned as indicative of whether a person is in the service of an employer are (1) whether he is subject to the continuing authority of the employer to supervise and direct the manner in which he renders services for compensation, irrespective of whether

736063—47——3

the employer actually does control the manner in which the services are performed; (2) the right of the employer to discharge the person; and (3) the furnishing of tools and of a place to work by the employer to the person who performs the services. Officers, superintendents, managers and other superior employees are employees within the meaning of the applicable statute.

In the present case, petitioner and Los Angeles Railway are designated as the "principals who shall manage and control said business." (R. 18.) As their joint agents, they appointed the presidents of the two companies to conduct the business through a manager, assistant manager, superintendent of equipment, and other subordinate officers and employees. (R. 17–19, 56.) Coach Lines as such has no officers and the joint employees engaged in the supervision and management of the operations are directly responsible to the general manager who in turn reports directly to the managing directors, the presidents of the two companies. (R. 64.) Thus, it is stipulated that petitioner, jointly with Los Angeles Railway, through its joint agents, directors, the manager and subordinate officers, hire employees, regulate the conditions of employment of employees and dismiss employees in the Coach Lines operations. (R. 56.) The general manager, together with his supervisory staff, have general charge of the operations but all matters of a controversial

nature or which in any way might conflict with the exclusive interests of petitioner or Los Angeles Railway, and all matters involving important questions of policy are determined by agreement between the presidents of the two companies. (R. 64.) Petitioner and Los Angeles Railway each does some of the work connected with the joint operation. (R. 65.) Each company owns and furnishes approximately one-half of the equipment and facilities devoted to the joint service and each retains title to the facilities it furnishes. (R. 64.) Thus, under the above-stated test of what constitutes an employee, as well as under any other conceivable test, the persons engaged in the Coach Lines operations are clearly the joint employees of petitioner and Los Angeles Railway. As the parties have stipulated (R. 17–18, 54–55), Coach Lines is merely a name adopted for convenience in identifying the bus operations conducted by petitioner and Los Angeles Railway.

The cases cited by petitioner (*Walling* v. *Baltimore Steam Packet Co.,* 144 F. 2d 130 (C. C. A. 4); *Allen* v. *Ocean S. S. Co. of Savannah,* 123 F. 2d 469 (C. C. A. 5); *Interstate Transit Lines* v. *United States,* 56 F. Supp. 332 (Neb.)) all involved corporations controlled by carriers and are therefore inapposite here.

CONCLUSION

The decision below is correct, and since the case turns upon its particular facts no further

review is warranted. The petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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MARCH 1947.

APPENDIX

Internal Revenue Code:

CHAPTER 9—EMPLOYMENT TAXES

SUBCHAPTER A—EMPLOYMENT BY OTHERS THAN CARRIERS

Part I—Tax on Employees

SEC. 1400. [As amended by Sec. 601 of the Social Security Act Amendments of 1939, c. 666, 53 Stat. 1360.] RATE OF TAX.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every individual a tax equal to the following percentages of the wages (as defined in section 1426 (a)) received by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages received during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1400.)

SEC. 1401. DEDUCTION OF TAX FROM WAGES.

(a) *Requirement.*—The tax imposed by section 1400 shall be collected by the employer of the taxpayer, by deducting the amount of the tax from the wages as and when paid.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1401.)

Part II—Tax on Employers

SEC. 1410. [As amended by Sec. 604 of the Social Security Act Amendments of 1939, *supra.*] RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of the wages (as defined in section 1426 (a)) paid by him after December 31, 1936, with respect to employment (as defined in section 1426 (b)) after such date:

(1) With respect to wages paid during the calendar years 1939, 1940, 1941, and 1942, the rate shall be 1 per centum.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1410.)

Part III—General Provisions

SEC. 1426. [As amended by Sec. 606 of the Social Security Act Amendments of 1939, *supra.*] DEFINITIONS.

When used in this subchapter—

(a) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium other than cash; except that such term shall not include—

(1) The part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year;

* * * * *

(b) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, by an employee for the person employing him, * * * except—

* * * * *

(9) Service performed by an individual as an employee or employee representative as defined in section 1532;

* * * * *

(d) *Employee.*—The term "employee" includes an officer of a corporation.

* * * * *

(f) *Person.*—The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1426.)

SEC. 1432. [As added by Sec. 607 of the Social Security Act Amendments of 1939, *supra.*]

This subchapter may be cited as the "Federal Insurance Contributions Act."

(26 U. S. C. 1940 ed., Sec. 1432.)

SUBCHAPTER B—EMPLOYMENT BY CARRIERS

Part I—Tax on Employees

SEC. 1500. RATE OF TAX.

In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation of such employee

as is not in excess of $300 for any calendar month, earned by him after the effective date of this subchapter—

1. With respect to compensation earned during the calendar year 1939, the rate shall be 2¾ per centum;

2. With respect to compensation earned during the calendar years 1940, 1941, and 1942, the rate shall be 3 per centum;

* * * * *

(26 U. S. C. 1940 ed., Sec. 1500.)

SEC. 1501. DEDUCTION OF TAX FROM COMPENSATION.

(a) *Requirement.*—The tax imposed by section 1500 shall be collected by the employer of the taxpayer by deducting the amount of the tax from the compensation of the employee as and when paid. If an employee is paid compensation by more than one employer with respect to any calendar month, then, under regulations made under this subchapter, the Commissioner may prescribe the proportion of the tax to be deducted by each employer from the compensation paid by him to the employee with respect to such month.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1501.)

Part III—Tax on Employers

SEC. 1520. RATE OF TAX.

In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following per-

centages of so much of the compensation as is not in excess of $300 for any calendar month paid by him to any employee for services rendered to him after December 31, 1936: *Provided, however,* That if an employee is paid compensation by more than one employer with respect to any such calendar month, the tax imposed by this section shall apply to not more than $300 of the aggregate compensation paid to said employee by all said employers with respect to such calendar month, and each such employer shall be liable for that proportion of the tax with respect to such compensation which his payment to the employee with respect to such calendar month bears to the aggregate compensation paid to such employee by all employers with respect to such calendar month:

1. With respect to compensation paid to employees for services rendered during the calendar year 1939, the rate shall be 2¾ per centum;

2. With respect to compensation paid to employees for services rendered during the calendar years 1940, 1941, and 1942, the rate shall be 3 per centum;

* * * * *

(26 U. S. C. 1940 ed., Sec. 1520.)

Part IV—General Provisions

* * * * *

SEC. 1531. ERRONEOUS PAYMENTS.

Any tax paid under this subchapter by a taxpayer with respect to any period with respect to which he is not liable to tax under this subchapter

shall be credited against the tax, if any, imposed by subchapter A upon such taxpayer, and the balance, if any, shall be refunded.

(26 U. S. C. 1940 ed., Sec. 1531.)

SEC. 1532. DEFINITIONS.

(a) *Employer.*—The term "employer" means any carrier (as defined in subsection (h) of this section), and any company which is directly or indirectly owned or controlled by one or more such carriers or under common control therewith, and which operates any equipment or facility or performs any service (except trucking service, casual service, and the casual operation of equipment or facilities) in connection with the transportation of passengers or property by railroad, or the receipt, delivery, elevation, transfer in transit, refrigeration or icing, storage, or handling of property transported by railroad, and any receiver, trustee, or other individual or body, judicial or otherwise, when in the possession of the property or operating all or any part of the business of any such employer: *Provided, however,* That the term "employer" shall not include any street, interurban, or suburban electric railway, unless such railway is operating as a part of a general steam-railroad system of transportation, * * *

(b) *Employee.*—The term "employee" means any person in the service of one or more employers for compensation: *Provided* * * *

The term "employee" includes an officer of an employer.

* * * * *

(d) *Service.*—An individual is in the service of an employer whether his service is rendered

within or without the United States if he is subject to the continuing authority of the employer to supervise and direct the manner of rendition of his service, which service he renders for compensation: * * *

(e) *Compensation.*—The term "compensation" means any form of money remuneration earned by an individual for services rendered as an employee to one or more employers, or as an employee representative, including * * *

* * * * *

(g) *Company.*—The term "company" includes corporations, associations, and joint-stock companies.

(h) *Carrier.*—The term "carrier" means an express company, sleeping-car company, or carrier by railroad, subject to part I of the Interstate Commerce Act.

(i) *Person.*—The term "person" means an individual, a partnership, an association, a joint-stock company, or a corporation.

(26 U. S. C. 1940 ed., Sec. 1532.)

SUBCHAPTER C—TAX ON EMPLOYERS OF EIGHT OR MORE

SEC. 1600. [As amended by Sec. 608 of the Social Security Act Amendments of 1939, *supra.*] RATE OF TAX.

Every employer (as defined in section 1607 (a)) shall pay for the calendar year 1939 and for each calendar year thereafter an excise tax, with respect to having individuals in his employ, equal to 3 per centum of the total wages (as defined in section 1607 (b)) paid by him during the calendar

year with respect to employment (as defined in section 1607 (c)) after December 31, 1938.
(26 U. S. C. 1940 ed., Sec. 1600.)

SEC. 1601. [As amended by Sec. 609 of the Social Security Act Amendments of 1939, *supra.*]
CREDITS AGAINST TAX.

(a) *Contributions to State Unemployment Funds.*

(1) The taxpayer may, to the extent provided in this subsection and subsection (c), credit against the tax imposed by section 1600 the amount of contributions paid by him into an unemployment fund maintained during the taxable year under the unemployment compensation law of a State which is certified for the taxable year as provided in section 1603.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1601.)

SEC. 1607. [As amended by Sec. 614 of the Social Security Act Amendment of 1939, *supra.*]
DEFINITIONS.

When used in this subchapter—

(a) *Employer.*—The term "employer" does not include any person unless on each of some twenty days during the taxable year, each day being in a different calendar week, the total number of individuals who were employed by him in employment for some portion of the day (whether or not at the same moment of time) was eight or more.

(b) *Wages.*—The term "wages" means all remuneration for employment, including the cash value of all remuneration paid in any medium

other than cash; except that such term shall not include—

(1) That part of the remuneration which, after remuneration equal to $3,000 has been paid to an individual by an employer with respect to employment during any calendar year, is paid to such individual by such employer with respect to employment during such calendar year;

* * * * *

(c) *Employment.*—The term "employment" means any service performed prior to January 1, 1940, which was employment as defined in this section prior to such date, and any service, of whatever nature, performed after December 31, 1939, within the United States by an employee for the person employing him, irrespective of the citizenship or residence of either, except—

* * * * *

(9) Service performed by an individual as an employee or employee representative as defined in section 1 of the Railroad Unemployment Insurance Act;

* * * * *

(i) *Employee.*—The term "employee" includes an officer of a corporation.

* * * * *

(k) *Person.*—The term "person" means an individual, a trust or estate, a partnership, or a corporation.

* * * * *

(26 U. S. C. 1940 ed., Sec. 1607.)

SEC. 1611. [As added by Sec. 615 of the Social Security Act Amendments of 1939, *supra.*]

This subchapter may be cited as the "Federal Unemployment Tax Act."

(26 U. S. C. 1940 ed., Sec. 1611.)

The above-quoted provisions of subchapter B of Chapter 9 of the Internal Revenue Code, relating to employment by carriers, are derived from the Carriers Taxing Act of 1937, c. 405, 50 Stat. 435. The only substantive difference between the original and present provisions is that Sections 2 (a) and (3) (a) of the original act specified the rate of tax levied for the years 1937 and 1938, whereas the Code specifies the rate only for 1939 and subsequent years. Thus: Carriers Taxing Act of 1937, c. 405, 50 Stat. 435:

SEC. 2. (a) In addition to other taxes, there shall be levied, collected, and paid upon the income of every employee a tax equal to the following percentages of so much of the compensation of such employee as is not in excess of $300 for any calender month, earned by him after December 31, 1936—

1. With respect to compensation earned during the calendar years 1937, 1938, and 1939, the rate shall be 2¾ per centum;

* * * * *

(45 U. S. C. 1940 ed., Sec. 262.)

SEC. 3. (a) In addition to other taxes, every employer shall pay an excise tax, with respect to having individuals in his employ, equal to the following percentages of so much of the compensation as is not in excess of $300 for any calendar

month paid by him to any employee for services rendered to him after December 31, 1936: *Provided, however,* * * *;

1. With respect to compensation paid to employees for services rendered during the calendar years 1937, 1938, and 1939, the rate shall be 2¾ per centum;

* * * * *

(45 U. S. C. 1940 ed., Sec. 263.)

The above-quoted provisions of subchapters A and C of Chapter 9 of the Internal Revenue Code, now designated as the "Federal Insurance Contributions Act" and the "Federal Unemployment Tax Act," respectively, are derived from Sections 801, 802, 804, and 811 of Title VIII and Sections 901, 902 and 907 of Title IX of the Social Security Act. c. 531, 49 Stat. 620.

Treasury Regulations 100, promulgated under the Carriers Taxing Act of 1937:

ART. 3. *Who are employees.*—(*a*) *General.*—Within the meaning of the Act, any person is an *employee* if he is in the service of one or more employers (as defined in section 1 (a)) for compensation. An individual is in the service of an employer if he is subject to the continuing authority of the employer to supervise and direct the manner in which he renders services for compensation. It is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if the employer has the right to do so. The right of an employer to discharge an individual is also an important factor indicating that the individual is an employee. Other factors indicating that an

individual is an employee are the furnishing of tools and the furnishing of a place to work by the employer to the individual who performs the services. * * *

* * * * *

Whether or not an individual is an employee will be determined upon an examination of the particular facts of the case.

If an individual is an employee, it is of no consequence that he is designated as a partner, coadventurer, agent, independent contractor, or otherwise, or that he performs services on a part-time basis. The age of the individual, or the measurement, method, or designation of the remuneration, is immaterial, if he is in fact an employee.

The Act makes no distinction between classes or grades of employees. Thus, superintendents, managers, and other superior employees are employees within the meaning of the Act. An officer of an employer is an employee. A director is not an employee unless he performs services other than those required by attendance at and participation in meetings of the board of directors.

* * * * *

Treasury Regulations 106, promulgated under the Federal Insurance Contributions Act:

SEC. 402.204. *Who are employees.*—Every individual is an employee if the relationship between him and the person for whom he performs services is the legal relationship of employer and employee.

Generally such relationship exists when the person for whom services are performed has the

right to control and direct the individual who performs the services, not only as to the result to be accomplished by the work but also as to the details and means by which that result is accomplished. That is, an employee is subject to the will and control of the employer not only as to *what* shall be done but *how* it shall be done. In this connection, it is not necessary that the employer actually direct or control the manner in which the services are performed; it is sufficient if he has the right to do so. The right to discharge is also an important factor indicating that the person possessing that right is an employer. Other factors characteristic of an employer, but not necessarily present in every case, are the furnishing of tools and the furnishing of a place to work, to the individual who performs the services. * * *

* * * * *

Whether the relationship of employer and employee exists will in doubtful cases be determined upon an examination of the particular facts of each case.

If the relationship of employer and employee exists, the designation or description of the relationship by the parties as anything other than that of employer and employee is immaterial. Thus, if such relationship exists, it is of no consequence that the employee is designated as a partner, coadventurer, agent, or independent contractor.

* * * * *

No distinction is made between classes or grades of employees. Thus, superintendents, managers,

and other superior employees are employees. An officer of a corporation is an employee of the corporation but a director as such is not. A director may be an employee of the corporation, however, if he performs services for the corporation other than those required by attendance at and participation in meetings of the board of directors.

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U. S. GOVERNMENT PRINTING OFFICE: 1947